carriage casts upon them, of showing that they have before and at the beginning of the voyage exercised due diligence to make the vessel seaworthy.

The defendants in discharge of this burden in their particulars pleaded that "the diligence taken by the defendants to secure the seaworthiness of the *M.V. Kantang* was to have the vessel surveyed by a qualified surveyor on or about the 27th July, 1967 when the vessel was certified to be seaworthy and no alteration or repairs were advised. Subsequently, a qualified surveyor appointed by the insurance company which insured the said vessel also reported that the vessel was seaworthy and in good order. The Master of the "Kantang" examined the vessel prior to sailing and her engine was repaired and put in order prior to sailing."

Are the contentions of the defendants sound?

I am satisfied that Capt. Roseli inspected the vessel before she left Singapore and that there was no leakage. It is true that the captain made only a visual inspection but I do not think it is obligatory upon a ship's officer on the commencement of a voyage to go and tap every plank in the hull to find if it has a defect or not. I am satisfied that Capt. Roseli had exercised due diligence.

There is no doubt that there was some bad workmanship in fixing the planks of the hull which was entirely the fault of the workmen employed by the ship repairer. The real cause of the planks loosening will never be known. In the present case the defendants had Capt. Frappell to advise them on the repairs to the vessel. Capt. Frappell has a large experience in the repairs and building of ships including wooden ships. I am satisfied on the evidence that Capt. Frappell had exercised due diligence when examining the vessel and that in fact he carried out the examination with reasonable skill and competence and had not been negligent.

I find that the defendants had exercised due diligence to make the "Kantang" seaworthy and therefore the defendants are entitled to the protection of the Ordinance.

The claim of the plaintiffs is dismissed with costs.

Claim dismissed.

Solicitors: *Lee & Lee; Laycock & Ong.*

MALAYSIAN REPORTS

RAMAMOORTHY v. MENTRI BESAR OF SELANGOR & ANOR.

[F.C. (Ong C.J. (Malaya), Gill & Ali F.JJ.) June 5, 1970]

[Kuala Lumpur — Federal Court Civil Appeal No. X 53 of 1969]

Government Proceedings — Relief — Specific performance — Whether court can make order — Declaratory order — Government Proceedings Ordinance, 1956, s. 29(1)(a).

Practice and Procedure — Declaration — Application for — Proper procedure — Joinder of parties — R.S.C. 1957, O. 54A r. 1A.

Land Laws — Auction — Sale of land to recover arrears of quit rent — Service of notice on proprietor — Irregularity — Annulment of sale — Discretion of Mentri Besar — Land Code (F.M.S. Cap. 138), ss. 204, 220 and 221.

This was an appeal from the judgment of Abdul Aziz J. ([1969] 2 M.L.J. 97) dismissing the appellant's action (a) for a declaration that the annulment by the Mentri Besar of Selangor (first respondent) of the sale by public auction, for the recovery of arrears of land revenue, of land held under Grant No. 9562 for Lot No. 1843 in the Mukim of Rawang in the district of Ulu Selangor was null and void, (b) for an order by way of specific performance that the second respondent do transfer the said land to the appellant and (c) for damages. The first respondent had annulled the sale on the ground that the notice for sale had not been properly served.

Held, dismissing the appeal: (1) by virtue of section 29 of the Government Proceedings Ordinance, the appellant's claim for specific performance was rightly disposed of by the learned trial judge;

(2) although the learned judge was not right in taking the point that the appellant should have applied for the declaration sought by way of originating summons under O. 54A r. 1A instead of by a specially indorsed writ, because the appellant was also asking for the consequential relief of damages, in this case he was not influenced by the alleged procedural irregularity in dismissing the action;

(3) in this case, the registered proprietor's rights would be placed in jeopardy, if the declaration was made, because his ownership over the property remained intact until the auction sale was made final and conclusive. So long as he was the owner of the land, in respect of which some sort of declaration was sought, it was but right and proper that he should have been made a party;

(4) service of the notice of sale on the registered proprietor was the first step in the proceedings to recover arrears of land rent. As the Mentri Besar annulled the sale solely on the ground that the notice of sale was not served as required by the Land Code, submission of counsel for the appellant that he had neither jurisdiction nor valid grounds for annulling the sale must be rejected;

(5) so long as there was something in writing to constitute an order of annulment of the sale, there was sufficient compliance with the provisions of section 221(i) of the Code.

Case referred to:-

(1) *Barlow* v. *Vestry of the Parish of St. Mary Abbotts Kensington* (1886) 11 App. Cas. 257.

FEDERAL COURT.

D. P. Vijandran for the appellant.

Haji Mohamed Azmi bin Dato Haji Kamaruddin (Senior Federal Counsel) for the respondents.

Gill F.J.: This is an appeal from a judgment of Abdul Aziz J. dismissing the appellant's action (a) for a declaration that the annulment by the Mentri Besar

of Selangor (first respondent) of the sale by public auction, for the recovery of arrears of land revenue, of land held under Grant No. 9562 for Lot No. 1843 in the Mukim of Rawang in the district of Ulu Selangor was null and void, (b) for an order by way of specific performance that the second respondent do transfer the said land to the appellant and (c) for damages.

The facts of the case were not in dispute. The registered proprietor of the land in question was one Kavanna Yeena Packeer Mohideen Rawther s/o Ismail Ghani Rawther. He failed to pay the annual rent on the land for the years 1963 and 1964, with the result that a sum of $154 became an "arrear" under section 203 of the Land Code (F.M.S. Cap. 138) on 1st April, 1964. On 15th June, 1964 the Collector of Land Revenue, Ulu Selangor issued a notice of sale on the registered proprietor under section 204 of the Code in the prescribed Form (Form A in Schedule 1) of the Notice of Sale Rules, 1933. He then issued a public notice of sale under section 205 of the Land Code in the form prescribed by the said Rules, which was published in the Selangor *Gazette* of 3rd September, 1964 as Notification No. 594.

The land was put up to public auction under section 207 of the Land Code on 24th November, 1964 and sold to the appellant as the highest bidder for a sum of $4,450. On being declared the purchaser, the appellant immediately deposited in cash twenty five per centum on the amount of her bid, as required by section 210 of the Code, and paid the balance of the purchase money as required by Section 211 of the Code before the expiry of three months after the date of sale.

The notice of sale, on which the address of the registered proprietor was stated to be 9, Leboh Pudu, Kuala Lumpur, was served on one Mohamed Ibrahim who accepted it on behalf of Ismail Ghani Rawther Co., Ltd., which had been carrying on business at that address. The registered owner of the land was one of the shareholders of the company, but the shop belonging to the company had closed down on the company going into liquidation in February, 1964 and had since then been under the control of the official assignee. The land itself was at no time registered in the name of the company, and the person on whom the notice was served was not an agent of the registered proprietor who was then in India.

On 24th December, 1964 Messrs. Kam Woon Wah & Co. sent a letter to the collector on behalf of the attorney of the registered proprietor, requesting that the land be reverted to their client on payment of arrears of quit rent and other expenses, on the ground that their client had no knowledge of the notice of auction. They followed up by their letter of 31st December, 1964 requesting the collector to petition on behalf of their client to the Hon'ble the Mentri Besar for annulment of the auction sale.

On 14th January, 1965 the collector interviewed the attorney of the registered proprietor at Kuala Kubu Bharu in connection with the request for the annulment of the auction sale. On 26th January, 1965 he submitted a memorandum to the Commissioner of Lands and Mines, Selangor recommending that the auction sale be annulled under section 221 of the Land Code and the land reverted to the original registered owner. On 8th February, 1965 the commissioner submitted a memorandum to the Mentri Besar supporting the recommendation of the collector for the annulment of the auction sale. The Mentri Besar agreed with the recommendation for the annulment of the sale and signified his consent in writing on 11th February, 1965. The sale was to become final and conclusive, after the expiration of the statutory period of three months under section 220 of the Land Code, on 23rd February, 1965.

The appellant's claim for specific performance was disposed of by reference to proviso (a) to section 29(1) of the Government Proceedings Ordinance, 1956, which says that in any proceedings against the Government the court shall not make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties. It is said that the trial judge erred in law in thus disposing of that part of the plaintiff's claim. I do not agree, because the provisions of section 29 are sufficiently clear so as to leave no room for argument to the contrary.

The learned judge next took the point that the appellant should have applied for the declaration sought by way of Originating Summons under Order 54A rule 1A of the Rules of the Supreme Court, 1957, and not by way of a specially indorsed writ. I do not think he was right in taking that point because the appellant was also asking for the consequential relief of damages, but it is quite clear from his judgment that the learned judge was in no way influenced by this alleged procedural irregularity in dismissing the action. I do not think therefore that the appellant's grounds of appeal in relation to this issue call for any consideration.

The learned judge then dealt with the fact that the registered proprietor was not made a party to the action. In this connection the appellant has raised three grounds of appeal all of which boil down to the argument that the learned judge was wrong in holding that the failure to make the registered proprietor a party to the action was a material defect in the proceedings. It is said that nowhere in his judgment did he say why or how the proprietor of the land was an interested party in the sense that he might be prejudiced by the declaration. I can find no substance in this assertion, because the learned judge quite clearly said that the registered proprietor's rights would be placed in jeopardy, if the declaration was made, because his ownership over the property remained intact until the auction sale was made final and conclusive. So long as he was the owner of the land, in respect of which some sort of declaration was sought, it was but right and proper that he should have been made a party. Any further discussion of this question, however, would be purely academic because here again there is nothing in the judge's judgment to suggest that he dismissed the action on this ground.

Coming to the merits of the case, it was not in dispute that the notice of sale was in fact served on a total stranger, and there was no evidence that the

notice came to the knowledge of the registered owner or his attorney at any time prior to the date of the auction sale. It is contended for the appellant that the mere fact that the notice of sale had not been properly served was not sufficient ground for the Mentri Besar to exercise his power of annulment. This contention is based on the provisions of section 204(iii) of the Code which read as follows: —

"Notwithstanding anything contained in sub-section (i) or in any rules made under sub-section (ii) or in any other provision of law whatsoever, no failure to serve or irregularity in serving any notice of sale under the provisions of sub-section (i) or of any rules made under sub-section (ii) shall invalidate any sale had under the provisions of this Part or give rise to any cause of action against the Government or any officer thereof by reason of such failure or irregularity."

That provision of the law would have been helpful to the appellant, had the sale become final and conclusive under section 220 of the Land Code, in that it would have ousted the jurisdiction of the Mentri Besar under section 221 of the Code to annul the sale, but its scope cannot be extended to support the proposition that the notice of sale need not be served on the registered owner.

The requirement as to service of the notice of an intended sale is contained in section 204(i) of the Code which reads as follows: —

"Upon any sum payable becoming an arrear the Collector shall, subject to the provisions of any Rules made under sub-section (ii), use reasonable diligence in causing to be served on the proprietor of the land affected a notice of sale in the prescribed Form, which shall be sealed with the Collector's seal of office."

It has been argued that that section merely requires the collector to use reasonable diligence in causing the notice to be served and is not sufficiently mandatory in its terms to require service on the proprietor of the land. A careful reading of the section would show that there is no substance in that argument. Service of the notice of sale on the registered proprietor is clearly the first step in the proceedings to recover arrears of land rent. In directing the notice to be served on the registered proprietor at 9, Leboh Pudu the collector must have genuinely believed that that was the proper address. When it was brought to his knowledge that the notice had been served on a wrong person, he promptly, and in my opinion quite rightly, put up a recommendation for the sale to be annulled.

As I have said, the sale was annulled under the provisions of section 221(i) of the Code which reads as follows: —

"The Mentri Besar may at any time before a sale under this Part has become final and conclusive upon proof to his satisfaction that the sale was had contrary to the provisions of this Part and that material irregularities occurred or that any proprietor or other person will suffer excessive hardship by reason of such sale, annul such sale by order in writing, provided that no such order shall be made (or if made shall be cancelled) after the date of institution of proceedings in Court for the annulment of the sale."

It is abundantly clear that the Mentri Besar annulled the sale solely on the ground that the notice of sale was not served as required by the Land Code. He stated in evidence that he found this to be a material irregularity. Can it possibly be argued that service of a notice of sale on a person other than the registered owner is not a material irregularity? I do not think so. Once there is a material irregularity, the sale had would logically be contrary to the provisions of the Code. There was not the slightest suggestion that the Mentri Besar was actuated by any improper motive in annulling the sale, and his power to annul the sale in the circumstances of the case was undeniable. I must therefore reject the submission by counsel for the appellant that the Mentri Besar had neither jurisdiction nor valid grounds for annulling the sale.

That brings me to the only other substantial ground of appeal, namely, that there was no "order in writing" by the Mentri Besar within the meaning of section 221(i) of the Code, the argument on the authority of *Barlow* v. *Vestry of the Parish of St. Mary Abbotts Kensington*[1] being that the order made by the Mentri Besar was not a valid order. That was a case in which a magistrate made a verbal order under section 75 of the Metropolis Management Amendment Act, 1862 directing the builder to demolish part of a house within eight weeks. The builder was present when the order was made, but it was not reduced into writing till the day when the eight weeks expired; after that day a copy was served upon him or came to his knowledge. It was held by the House of Lords, reversing the decision of the Court of Appeal, that the order was not "an order in writing" within the meaning of section 75, and was therefore invalid.

I fail to see how that case is relevant here. In the present case the order made by the Mentri Besar was not a verbal order. What happened here was this. A long memorandum setting out the facts of the case was put up to him. He wrote out on the relevant file the words "I agree with paragraph 2", put his signature under those words and wrote out the date thereunder. Paragraph 2 contained the recommendation by the commissioner, which I have mentioned earlier, that the sale be annulled. What the Mentri Besar did was clearly tantamount to his stating in writing that the sale be annulled. In my judgment, so long as there was something in writing to constitute an order of annulment of the sale, there was sufficient compliance with the provisions of section 221(i) of the Code. It is to be observed that there is no statutory requirement as to the Form of the order, nor is there any statutory requirement as to service of the order on anybody.

I would dismiss the appeal with costs.

Ong C.J. (Malaya) and **Ali F.J.** concurred.

Appeal dismissed.

Solicitors: *Athi Nahappan & Co.*